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ADMINISTRATIVE LAW SECTION of AMERICAN BAR ASSOCIATION

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A FEDERAL ADMINISTRATIVE COURT

SHALL WE HAVE IT NOW?

On January 27 the chairman of the Senate Judiciary Committee introduced a bill (S. 684) to create an Administrative Court of the United States. In support of that proposal he also released an explanatory statement. Both are published in the *Congressional Record* for January 27 at pages 573-575.

The bar is thus for the first time fully informed of Senator Pat McCarran's threefold design for improving federal administrative justice. **First** was the Administrative Procedure Act which, although originating in the bar after much discussion, he put through the national legislative process. **Second** is his recent proposal (S. 527) for a statutory commission to formulate uniform rules of federal administrative procedure, as discussed in this Bulletin under date of January 31. **Third** and last is his present bill for an Administrative Court. All are closely related. The background of the Administrative Procedure Act is known to lawyers. The general idea of uniform rules of administrative procedure was advocated at the Seattle meeting last September. But the Administrative Court proposal has not been discussed in bar circles for some years.

Although during the last ten years attention of the bar has been turned in other directions for the improvement of administrative justice, the creation of a federal Administrative Court has been proposed for at least twenty years. In January 1929 Senator George W. Norris of Nebraska introduced such a bill (S. 5154, 70th Congress) and supported his action by a vigorous statement (70 Cong. Rec. 1030-1033). No action was taken during the depression period which thereafter began within that year. But the proposal was revived by Senator Logan of Kentucky in 1933 (S. 1835, 73d Congress).

The basic idea has been accepted by students of such varying points of view as James M. Beck (*Our Wonderland of Bureaucracy*, 1932, pp. 176-177) and Frederick F. Blachly and Miriam Oatman (*Administrative Legislation and Adjudication*, 1934, pp. 276 *et seq.*). American students of administration and administrative law generally have tended to favor the establishment of an administrative court (see James Hart, *The President and Federal Administration* in *Essays on the Law and Practice of Governmental Administration*, 1935, pp. 81-84).

In 1934 the then newly created Administrative Law Committee of the American Bar Association favored the establishment of a federal Administrative Court as the preferred method of dealing with the growing problem (59 A.B.A. Rep. 549-550). It did the same the following year (60 A.B.A. Rep. 136-139). In 1936 the Committee submitted an exhaustive statement (61 A.B.A.

Rep. 721-767) and the Assembly of the American Bar Association approved the principle of the establishment of a Federal Administrative Court (*id.* 233-235).

Senator Logan reintroduced his bill in 1936 (S. 3787, 74th Congress) and was joined by Representative Celler in the House (H.R. 12297). They offered such measures again in 1937, 1938, and 1939 (75th Congress, S. 273, S. 3676, and H.R. 2240; 76th Congress, S. 916, H.R. 234, and H.R. 4235). Hearings were held by a Senate Judiciary Subcommittee in April, May, and June 1938 on S. 3676 of the 75th Congress (Parts 1-5, *United States Court of Appeals for Administration*).

But the position of the Committee of the American Bar Association had suddenly veered in 1937 to support of a statute prescribing and regulating administrative procedure as such, largely because of the opposition of the bar of specialized courts to any proposal which would merge the tribunals in which they were interested (*id.* 20-60; 62 A.B.A. Rep. 805-807). Without the support of the bar, members of Congress apparently ceased to be interested.

Students of the administrative system have continued to think, and occasionally to write, about the need for an administrative court. Thus, in their *Federal Regulatory Action and Control,* Frederick F. Blachly and Miriam E. Oatman of the Brookings Institution said in 1940 (page 266):

> This type of court would eliminate the difficulties which result from the present multiplicity of review authorities. Through such a court review procedure would be systematized and jurisprudence would be unified. The advantages of expert knowledge would be obtained, while every right of the individual would be preserved. The whole work of federal administration would rise in public esteem and gain in public confidence, for the good reason that it could operate more efficiently under a consistent and unified law and jurisprudence than under the present miscellany of statutes and decisions.

They were speaking of the type of specialized tribunal which is now proposed in S. 684 of the 81st Congress by Senator Pat McCarran.

Senator McCarran's bill, and his explanation of it, are reproduced in full in this Bulletin. They are administrative law documents of lasting interest and importance.

ADMINISTRATIVE COURT BILL

The following bill (S. 684) "to improve the administration of justice by the creation of an Administrative Court of the United States" was introduced in the Senate of the United States on January 27 by Senator Pat McCarran. It has been referred to the Senate Judiciary Committee, of which Senator McCarran is chairman. Interested lawyers should write their senators or congressmen for copies and request to be kept advised of further legislative action or documents on the subject. The full measure, as it appears in the CONGRESSIONAL RECORD *for January 27 at page 573, reads as follows:*

SEC. 1. There shall be a court of record known as the Administrative Court of the United States. By and with the advice and consent of the Senate the President shall appoint a chief judge and four associate judges for the court, who shall be learned and experienced in both the general and administrative law of the United States but shall not, within 5 years of such appointment, have served as an officer or employee in the executive branch of the Government of the United States.

No more than three of the judges of the court shall be appointed from the same political party. It shall be organized and begin to function as soon as its chief judge and two of its associate judges shall have been appointed and qualify. Each judge shall hold office during good behavior and receive a salary equal to that of a circuit judge. On the request of the court any active or retired judge of the United States may on his consent be assigned, by the chief judge of his court or the Chief Justice of the United States, to duty as a judge of the court for a temporary period or for participation in specified cases there pending. The chief judge shall have precedence and preside at any session of the court which he attends. Whenever the chief judge is not present, is unable to perform the duties of his office, or the office is vacant, his duties shall devolve pro tem upon the associate judge in active service who is next in precedence. The associate judges shall have precedence according to the seniority of their commissions but, if commissions bear the same date, precedence shall be determined according to seniority in age.

JURISDICTION AND POWERS

SEC. 2. To provide an effective remedy for every wrong to any person as well as to provide for the just enforcement of public policy except (1) with respect to cases otherwise cognizable in the Court of Claims, the Customs Court, the Court of Customs and Patent Appeals, or the Tax Court or (2) so far as a money judgment is sought, an issue of tax liability is presented, or the grant or denial of a patent is questioned—

(a) The court shall have exclusive jurisdiction of all cases which, except for this act, would be within the jurisdiction of any court of the District of Columbia (1) for the judicial review of agency action or (2) for the civil enforcement of the rules, orders, or investigative demands of any agency.

(b) The court may take jurisdiction in any case involving the judicial review of agency action, otherwise cognizable or pending in any court of the United States other than the Supreme Court, at the request of any person who (1) desires to bring such an action or (2) has brought it elsewhere but seeks to transfer it to the court before trial, argument, or submittal for decision.

(c) The court may take jurisdiction in any case involving the civil enforcement of the rules, orders, or investigative demands of any agency, otherwise cognizable or pending in any court of the United States other than the Supreme Court, at the request of any person against whom such an action has been brought but has not been tried, argued, or submitted for decision.

(d) With the permission of the court any agency may institute in the court an original action for the suspension or revocation of the whole or part of any license otherwise subject to revocation by the agency.

(e) In any case in which jurisdiction is conferred by this section the court shall have all the powers of any court which has, or but for this act would have, jurisdiction. In addition, in connection with any case in which jurisdiction is conferred upon the court by this section or in any case which may be instituted in the court for the purpose by any person or agency, the court shall have authority (1) to declare in any dispute the rights, privileges, immunities, and legal relations of any person or agency with respect to agency action or powers and (2) to direct, compel, or otherwise provide for the taking of agency

action wrongfully withheld or erroneously applied. For all purposes the court shall be deemed an independent, specialized, and superior tribunal with respect to the subject matter and issues of fact or legislation before it, endowed with primary jurisdiction and final authority, and created to assure protection of all persons, conformity with legislative policy, and uniformity in the interpretation and administration of law.

OPERATION AND PROCEDURE

SEC. 3. The official station of the judges of the court shall be the District of Columbia. Not less than three judges shall constitute the court in any case of a type which, except for this act or if brought in another court, would require a court of more than one judge. Otherwise any one or more of the judges of the court, including judges temporarily assigned thereto, shall suffice as provided by the rules of the court. Where more than one judge sits, a majority of the judges of the court for the case shall constitute a quorum. The court shall hold an annual term at the seat of government but may hear or decide cases at general, special, or adjourned terms or sessions at any place within the jurisdiction of the United States. In any case in which the permission of the court is required it may be sought by ex parte petition or otherwise as the court may provide by rule or instruction. A written opinion shall be filed as a part of the record in each case, certified to each of the named parties therein, and published in compilations issued by the court from time to time. Save as modified by the court, general rules of procedure in the district courts of the United States shall govern. So far as pertinent, the general provisions of the Judicial Code (28 U. S. C., part V) and the provisions thereof respecting procedure in the Court of

Claims (28 U. S. C., ch. 165) shall apply. The court, and each judge or commissioner thereof, shall possess all the powers of a district court of the United States for preserving order, compelling the attendance of witnesses, requiring the production of evidence, and achieving the execution of process.

JUDGMENTS AND REVIEW

SEC. 4. To assure in every case both that full justice shall have been done to each person and that public policy shall be fairly and equitably executed—

(a) In any case determined by one judge of the court, the judgment shall become final at the expiration of 30 days unless within that time (1) the parties waive rehearing and review by the court, in which case it shall become final upon such waiver, (2) it is modified or suspended by the judge who entered it, in which case the time shall begin to run again after such modification or the reentry of the judgment, or (3) any party thereto petitions for a review by three or more judges of the court sitting as an appellate division pursuant to the rules of the court. If such a petition is filed and denied, the judgment shall thereupon be final. If such review is granted, the judgment shall become final when and as affirmed, modified, or reversed by the appellate division of the court after opportunity for rehearing.

(b) In any case determined originally in the court by more than one judge, the judgment shall be final after opportunity for rehearing.

(c) Any final judgment of the court shall be reviewable only by the Supreme Court on writ of certiorari granted at the petition of any party, or on appeal if such would be available but for

this act, (1) to the extent that such review may be required by the Constitution or (2) so far as the court may have failed in any case to afford full and equal protection to private and public rights, powers, privileges, or immunities. The court may also certify to the Supreme Court any question of law in any case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions on such questions.

MISCELLANEOUS

SEC. 5. For the purposes of this act—

(a) The definitions stated in the Judicial Code (28 U. S. C. sec. 451) and the Administrative Procedure Act (5 U. S. C. sec. 1001) shall be applicable to the same terms used in this act.

(b) The court and the judges thereof shall be subject to the pertinent general provisions of the Judicial Code (28 U. S. C. ch. 21). The budget of the court shall be handled in the same manner as that of the Court of Claims (28 U. S. C. sec. 605). Judges of the court may retire for disability in the same manner as judges of the Court of Claims (28 U. S. C. sec. 372).

(c) The officers and employees of the court shall be the same, and be governed by the same provisions of law so far as relevant, as those of the courts of appeals (28 U. S. C. ch. 47) and the Court of Claims (28 U. S. C. ch. 51). They shall also be subject to the general provisions of the Judicial Code applicable to officers and employees of other courts of the United States (28 U. S. C. ch. 57).

(d) The court shall at any time report to Congress the need for additional judges or for legislation in its field of special competence or jurisdiction.

EXPLANATION OF COURT BILL

In introducing his bill for the creation of an Administrative Court, Senator McCarran inserted the following thoughtful explanation in the CONGRESSIONAL RECORD *for January 27 at pages 573-575. He refers to general improvements in the federal judicial system during the last fifteen years, to the new tasks heaped upon the courts since 1933, to the use of the special court device from time to time to meet special problems in other fields, and to the general features of his proposal for a new federal Administrative Court. The background he thus sketches is compelling, and his proposal is persuasively simple. His explanatory statement reads in full as follows:*

I am today introducing a bill "to improve the administration of justice by the creation of an Administrative Court of the United States." The subject is not new. The condition it is designed to meet is not new. I should like to say a few words about both.

I

The need for a measure such as this is something we all know about generally. We know that government is growing larger in size. The complexity of the modern administrative machine of state increases daily. Its impact upon our people grows more intense. Its interests flow beyond the seas.

Now, with world leadership forced upon us, we must be even more vigilant that our domestic concerns and our institutions at home retain the vigor which has brought us this far along the road of history. We must avoid the regrettable chronicle of empires which, while extending their interests over the globe, neglected to make sure that there was commensurate progress at home.

But even on this continent times change and our institutions must be adjusted accordingly. In the field of government, the greatest development of the twentieth century has been the growth of administrative agencies and bureaus to do what Congress and the courts previously did. Nowadays more laws are made by administrative agencies than by Congress, except that we call those laws regulations instead of statutes. We spend hundreds of thousands of dollars every year merely publishing those regulations, in the Federal Register and the Code of Federal Regulations. Similarly, bureaus and commissions decide far more specific cases than the courts, except that we call those decisions orders instead of judgments. Some are published in vast sets of law books, but the greater part of them never see the light of publicity.

Faced with this condition, we have taken various precautions to continue a government of divided powers. Congress still retains its authority to empower and to guide, by the instructions it writes into the public statutes or the appropriation acts. But those instructions have necessarily become more and more general. The inevitable consequence has been that administrative agencies have greater and greater latitude to interpret the statutes we write.

Similarly, we still have a system of courts. During the last 15 years many things have been done to strengthen them in numbers and in method. We have provided for more and more judges. The bar of the country has given its best efforts to modernize judicial procedure. The judicial system as such has been developed by a series of notable statutes. But still the courts, though augmented in numbers and facilities, are no longer the tribunals of primary resort in the matters which we have committed to administrative agencies. The latter make the rules and decide the cases in the first instance. In great part the courts serve merely as appellate agencies designed, or deeming themselves designed, to exercise their powers only to correct abuses of the grossest nature.

II

In one respect I believe we have been unfair to our judicial system in recent years. We have heaped upon it new tasks in connection with new legislation of a social nature, not realizing that in the growth of the country their old functions have also grown in magnitude. In an age of specialization, we have also failed to afford them an opportunity to specialize. We have demanded that their jurisdiction embrace both old and new functions. And the new functions of the last 15 years, as we all know, are matters of utmost intricacy.

Of course, we have allowed this situation to continue because we respect our judicial institutions. We also desire to continue their general jurisdiction unimpaired so that they may bring our Federal justice to every district of the country where they sit. I should be the last person to say that we should abandon our ideal of one system of courts, one bar, and one law.

Yet our history demonstrates that we have had to depart from that ideal very often. In a sense, we have abandoned it most markedly in setting up numerous boards and commissions to do what our courts would have done in an earlier day. We also departed from the ideal when we created the Court of Claims, the customs and patent courts, and the Tax Court.

But those specialized courts were set up not in derogation of our legal system, but in recognition

that there were some specialties which required special courts to protect and foster—rather than to impair—our system of government under law. They are special courts only in the sense that they confine their attention to special subjects. Otherwise their methods and their judges are like those of other courts.

These special courts have been successful. I know of no real complaint about the special court system. It is therefore surprising that, despite the great expansion of Government and judicature in the last 15 years, no new specialized courts have been created for a generation or more. The reason, presumably, lies in the fact that we had previously and generously taken care of the several special fields of our law so that there was no great need for more of them.

III

But a dozen years ago it was widely proposed that there be established an administrative court. The proposal was endorsed and publicized by the American Bar Association. The idea appears to have perished for two reasons. First was the fact that, perhaps unwisely, it was proposed to abolish the specialized courts I have mentioned and merge them in the administrative court. Second was the fact that the legal profession turned its attention to more immediate problems such as the formulation of uniform rules of procedure and regulation of administrative procedure.

In considering remedies for some of the legal problems we have today, it has occurred to me that a properly constituted administrative court may contribute greatly to the improvement of the administration of justice. It may do so by contributing specialization where specialization

is sorely needed, by relieving the regular courts of part of their burdens, and by aiding both Government and private interests through expert handling of the complex problems of administrative law.

It is an anachronism for us to accept specialization as a necessity in administrative law at the administrative level, but to assume that generalization is sufficient at the judicial level of the same subject. If—as we are told—it requires specialists to regulate securities for example, why is not some specialization at least desirable in courts dealing with security regulation cases? Of course the specialization is desirable. We have admitted it in our legislation in recent years. During the war we created an Emergency Court of Appeals to assure specialization and uniformity in the judicial review of price-control regulations. More recently we have created a tax court out of what was previously a board, in order to achieve a judicial specialization in the field of taxation.

There would certainly be no harm in relieving our regular courts of some of their duties in administrative-law cases. Such proceedings are extensive. The record in a single case may be many volumes of print. The issues are complex. The courts must, therefore, devote to them precious time during which litigants in regular cases must suffer delays.

On the other hand, an administrative court could bring to its task a degree of familiarity, expertness, and dispatch which would improve the over-all administration of justice greatly in administrative-law cases. For the lack of those things both Government and people suffer in this field. The Government is injured every time a court fails to understand the special problems in

one of these cases. People seeking justice are injured every time a court, for lack of understanding, denies them their full rights or delays decision.

It should not be necessary to expand on these reasons. Obviously specialization is a matter of national policy, even in the judiciary, and we resort to it from time to time as need requires. Plainly the regular courts would be aided by relief from their present burdens. Manifestly expertness is needed at the judicial level for the adequate determination of intricate administrative-law cases.

IV

Believing as I do about these things, and with some familiarity as to legislative needs and judicial methods of our court system, I have sought to devise an Administrative Court which would be adequate to the problem but would not trench unduly upon either our regular or specialized courts in their essential functions. It has been necessary to determine (1) the type of court (2) its jurisdiction, (3) its operational procedure, and (4) its setting in our appellate system I should like to close this statement with a few words about each of these matters.

(1) We shall need an Administrative Court of several judges. I have proposed that there be five judges. They would be appointed in the usual fashion except that, because of the nature and purpose of the court, the appointees should have the special qualification of training and experience in administrative as well as other law. At the same time, however, it is essential that the court should not be made up of personnel drawn immediately from the executive branch because, among other things, appointments so made would require such judges to disqualify

themselves in many cases and would also lead people to feel that such a court would be unduly partial to Government agencies. Of course the court will measure up to its purpose only to the extent that its judges measure up to the necessary qualifications.

(2) In the matter of the jurisdiction of the court, it seems to me that a simple system will not only suffice for immediate purposes but will permit growth and adaptation over the coming years. I have therefore proposed that the court have (a) exclusive jurisdiction over all administrative law cases instituted in the District of Columbia and (b) permissive jurisdiction, at the instance of the private parties involved, with respect to such cases instituted elsewhere. But in neither situation would the court supersede the Court of Claims, the customs and patent courts, or the Tax Court.

(3) The procedure of the court would be of two kinds and, for each kind, it would be similar to that with which we are all familiar. When the court sits as a trial court, it would operate like other trial courts—with one or more judges, etc. It would also be a reviewing or appellate court in the same fashion as other courts—with three or more judges sitting in a case. In other words, there would be nothing unusual about the method and procedure in the court. It might operate anywhere in the country, however, depending upon the needs of its business as time goes on.

(4) In appropriate cases as required by the Constitution, and in any case in which the court should fail to afford equal protection to the parties before it, appeals could be taken to the Supreme Court in the same fashion as in other cases in other courts.

These are the essentials of my proposal. The provisions of the bill I have introduced are quite simple. Any member of Congress and any lawyer can understand them. For the problem it is designed to reach, this proposal is in fact much more direct and simple than many of the schemes laid before us.

In closing I should like to say again, as I have on other occasions, that we have a duty here to keep our governmental machine attuned to the needs of today and tomorrow and the years to come. What we do here in the way of substantive legislation will not long endure if we do not also make sure that we have a governmental machine that can handle it. At the same time we must maintain unbroken contact with our democratic tradition of a government of divided powers under law. The proposal I have made, for an Administrative Court of the United States, should aid us in performing that duty and achieving that purpose.

NEW JUDICIARY COMMITTEES

With the organization of the new 81st Congress there are new chairmen and some new members of the Committees on the Judiciary of the Senate and of the House of Representatives. These two committees are primarily responsible for federal administrative law legislation. The members of these committees who are not newcomers are well known to members of the bar. They are always glad to respond to inquiries for information. The new official line-up, by parties and in order of seniority, is as follows:

Senate Committee on the Judiciary

DEMOCRATS:

Pat McCarran (Nev.), *Chairman*
Harley M. Kilgore (W. Va.)
James O. Eastland (Miss.)
Warren G. Magnuson (Wash.)
J. Howard McGrath (R. I.)
Robert F. Wagner (N. Y.)
J. Melville Broughton (N. C.)
Bert Miller (Idaho)

REPUBLICANS:

Alexander Wiley (Wis.)
William Langer (N. Dak.)
Homer Ferguson (Mich.)
Forrest C. Donnell (Mo.)
William E. Jenner (Ind.)

House Committee on the Judiciary

DEMOCRATS:

Emanuel Celler (N. Y.), *Chairman*
Francis E. Walter (Pa.)
Sam Hobbs (Ala.)
William T. Byrne (N. Y.)
Joseph R. Bryson (S. C.)
Thomas J. Lane (Mass.)
Martin Gorski (Ill.)
Michael A. Feighan (Ohio)
Frank L. Chelf (Ky.)
Ed Gossett (Tex.)
J. Frank Wilson (Tex.)
Robert Ramsay (W. Va.)
Dixie Gilmer (Okla.)
Boyd Tackett (Ark.)
Edwin Willis (La.)
Winfield Denton (Ind.)
James B. Frazier, Jr. (Tenn.)

REPUBLICANS:

Earl C. Michener (Mich.)
Chauncey W. Reed (Ill.)
Louis E. Graham (Pa.)
Frank Fellows (Maine)
John Jennings, Jr. (Tenn.)
Clifford P. Case (N. J.)
Kenneth B. Keating (N. Y.)
William M. McCulloch (Ohio)
J. Caleb Boggs (Del.)
Angier L. Goodwin (Mass.)

WITHHOLDING COURT REVIEW TODAY

There was a time, during the last twenty years or so, when proposals to deprive courts of jurisdiction to review administrative action were seriously proposed and sometimes attempted. It now develops, however, that much the same thing has been growing in the field of federal government corporations, apparently with unwitting legislative sanction.

"In spawning these corporations during the past two decades," the Supreme Court said in the *Kiefer* case in 1939, "Congress has uniformly included amenability to law" (306 U. S. 381). But now, ten years later, legal control is being withdrawn at the very time that Congress, under the Government Corporation Control Act of 1945 (31 USC 841), is insisting upon tighter fiscal control.

Judicial review of government corporations is being narrowed through a variety of technical devices including the limitation of courts of review, the prohibition of certain forms of legal actions against them, and the diminution of periods of limitation. Thus the new Commodity Credit Corporation Charter Act withdraws jurisdiction from the Court of Claims by providing for "exclusive" jurisdiction in federal "district" courts, prohibits "attachment, injunction, garnishment, or other similar process" against the CCC, and provides a four-year period of limitations in place of the usual six (15 USC 714b(c)). The prohibition of certain forms of review actions is also to be found in statutes relating to the Federal Crop Insurance Corporation (7 USC 1506(d)) and Farmers Home Corporation (7 USC 1014(f)).

The situation is anomalous because corporations are supposed to be more amenable to legal process than other forms of federal agencies.

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